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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ONE BOEING 707 AIRCRAFT, ET AL.,
FG FLEUZEUGLEASING GmbH,

Petitioners

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Question I:

WHETHER THE LACK OF SETTLED STANDARDS DEFINING THE PARAMETERS OF CIVIL FORFEITURE LAW AS APPLIED TO INNOCENT OWNERS OF PROPERTY AND THE CIRCUIT COURTS' APPLICATION OF AD HOC STANDARDS IS A COMPELLING QUESTION JUSTIFYING SUPREME COURT REVIEW UNDER THE CONSTITUTIONAL DUE PROCESS CLAUSE.

Question No. II:

WHETHER THE INCONSISTENCIES WHICH EXIST BETWEEN THE CIRCUIT COURTS REGARDING THE APPLICATION OF *CALERO-TOLEDO* NECESSITATE THE ESTABLISHMENT OF A DEFINITIVE STANDARD REGARDING THE FORFEITURE OF PROPERTY OF INNOCENTS.

Question No. III:

WHETHER THE COURTS OF APPEALS HAVE BEEN AWARDED THE FUNCTION OF REWEIGHING EVIDENTIARY MATTERS AND SUBSTITUTING THEIR OWN JUDGMENT FOR THAT OF THE TRIAL COURT SIMPLY BECAUSE ONE MIGHT BE PERSUADED TO A DIFFERENT CONCLUSION BY THE EVIDENCE PRESENTED.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Fg Fleuzeugleasing GmbH, Petitioner, and owner of one Boeing 707 aircraft respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which

reversed the decision of the United States District Court for the Southern District of Texas and rendered judgment against the Petitioner for forfeiture of the aircraft.

PARTIES IN THE COURT BELOW

1. The United States of America.

2. Fg Fleuzeugleasing GmbH, a West German corporation wholly owned by an individual named Carl Press.

3. Servotech International Establishment, a Liechtenstein corporation whose agents for the purpose of this transaction were Mr. John Parks and Mr. Peter Towers.

THE OPINION BELOW

A copy of the judgment of the United States District Court for the Southern District of Texas entered on July 7, 1983 is attached as Appendix A. The Memorandum Opinion of the District Court is unreported. A copy of this opinion is attached as Appendix B. The judgment and opinion of the Fifth Circuit Court of Appeals is reported at 750 F.2d 1280 (1985). This opinion is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1985. The Supreme Court of the United States has jurisdiction to entertain this petition for Writ of Certiorari pursuant to 28 U.S.C. Section 1254(1). This petition is timely filed pursuant to 28 U.S.C. Section 2101(c) as it is applied for within ninety (90) days after the entry of the Appellate Court judgment in a civil proceeding.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 19, United States Code, Section 1618 provides in pertinent part:

> "Whenever any person interested in any vessel, . . . seized under the provisions of this Chapter . . . files with the Secretary of the Treasury under the Customs Laws or under Navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

Title 22, United States Code, Section 401 provides in pertinent part:

> "(a) Whenever an attempt is made to export or ship from or take out of the United States any arms or munitions of war or other articles in violation of law . . . any person duly authorized by the President, may seize and detain . . . all arms or munitions of war . . . and aircraft seized pursuant to this subsection shall be forfeited."

Title 28, United States Code, Section 1254(1) provides in pertinent part:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . .

Title 28, United States Code, Section 1345 provides in pertinent part:

> "Except as otherwise provided by Act of Congress, the District Courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Title 28, United States Code, Section 1355 provides in pertinent part:

> "The District Courts shall have original jurisdiction, exclusive of the Courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress.

Title 28, United States Code, Section 2101(c) provides in pertinent part:

> "Any other appeal or any Writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety (90) days after the entry of such judgment or decree. . .

STATEMENT OF THE CASE

The Petitioner herein seeks review of a judgment and opinion rendered by the Fifth Circuit Court of Appeals. Appeal to the Fifth Circuit was originally taken by the United States of America ("the government") and a Claimant in this matter, Servotech International Establishment ("Servotech"), from a decision of the United States District Court for the Southern District of Texas ganting forfeiture of certain weapons[1] owned by Servotech and denying the government forfeiture of one Boeing 707 aircraft. Jurisdiction was originally vested in the United States District Court pursuant to Title 28, United States Code, Sections 1345 and 1355.

This forfeiture action was initiated by the government pursuant to 22 U.S.C. Section 401.[2] The aircraft and munitions were originally seized by United States Custom Officials on May 12, 1981 at Houston Intercontinental Airport. The forfeiture action was thereafter filed by the government on November 9, 1981. In its complaint, the government alleged that Servotech was attempting to illegally transport munitions of war to an embargoed country. The government asserted that forfeiture of the aircraft was warranted in addition to forfeiture of the weapons in that the aircraft was allegedly to be used to facilitate the illegal export.

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1. The weapons which were forfeited to the government consisted of eleven thousand forty-six (1,146) M16 Automatic Rifles, two hundred fifty-nine (259) pistols and one hundred (100) grenade launchers.

2. The text of this Statute previously set forth herein permits the Government to seize and detain all arms or munitions of war and vehicles used in furtherance of the illegal exportation of said munitions of war. The statute further provides that arms and aircraft seized pursuant to this Section shall be forfeited.

Petitioner herein, Fg Fleuzeugleasing GmbH ("FG") is the owner of the seized aircraft. Servotech is the owner of the seized weapons. FG is a West German corporation organized for the purpose of leasing aircraft to companies which provide charter services. At the time of seizure, the aircraft in question was leased to an Austrian corporation known as Montana-Austria.[3] At the time of the seizure Montana-Austria had been in possession of the aircraft for approximately three (3) years pursuant to a written lease agreement. Montana-Austria was to utilize the aircraft in routine charter flights to various parts of the world. Mr. Carl Press, the sole owner of FG understood that the company was to be involved in transporting produce to the Middle East and transporting passengers and cargo to various other places throughout the world. (R. Vol. 8, p. 9) Prior to the seizure, Mr. Press had no knowledge or reason to believe that its lessee, Montana-Austria, would be involved in illegal activities. (R. Vol. 8, p. 9).

Montana-Austria, as lessee of the aircraft, would provide charter services to various companies located throughout the world. At the time in which the aircraft was seized, Servotech had chartered the aircraft from Montana-Austria for the purposes of flying steel fabricates to Kartoom, Sudan.[4] On May 11, 1981 the destination of the flight was changed to Johannesburg, South Africa.[5]

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3. Montana-Austria has made no claim to the aircraft and has never been a party to this action.

4. At trial the Government introduced a telegram sent by Montana-Austria to the Civil Aeronautics Board on May 7, 1981 requesting confirmation to fly the cargo of steel fabricates to Kartoom. Plaintiffs Exhibits 11-13.

5. Plaintiff's Exhibits 11-13.

The plane was seized prior to the loading of any munitions upon the aircraft. The case was called to trial by the Honorable George E. Cire on April 18, 1983. After a two (2) day hearing, the Court determined that the government had probable cause to seize the weapons and aircraft under the assumption that Servotech was attempting to transport the weapons to South Africa in violation of customs regulations. After the finding of probable cause, a jury was summoned to determine if forfeiture of the weapons and aircraft was proper in light of the facts surrounding the incident.

At trial, the owner of FG testified that he had no knowledge of the transaction giving rise to the seizure.[6] He further demonstrated that precautions were taken to insure that the aircraft was not used in an illegal manner.[7] The government offered no evidence regarding FG's knowledge of the intended use of the aircraft but maintained the position throughout the trial that innocence of wrongdoing was not a defense to a forfeiture action. The government, furthermore, offered no evidence regarding FG's lack of diligence in preventing the proscribed use of its aircraft and failed to request a jury verdict on this issue, but raised the issue for the first time on appeal.

At the conclusion of the trial the jury found that FG did not consent to nor participate in the alleged arms exportation attempt.[8] FG did thereafter submit a motion for finding and judgment in its favor based upon its innocense of wrongdoing. On July 7, 1983, the District

6. R. Vol. 8, P. 8.

7. R. Vol. 8, P. 6-7; R. Vol. 8, P. 8.

8. R. Vol. 1, P. 101-102.

Court granted FG's motion for finding and judgment and issued its opinion determining that FG did all that reasonably could be expected of an aircraft leasing company to prevent illegal use of its aircraft.[9] The Court ordered the aircraft to be returned to FG. The District Court also ruled that the weapons were the subject of an illegal export attempt and were, therefore, subject to forfeiture.

Servotech perfected its appeal to the Fifth Circuit Court of Appeals and the government perfected its cross-appeal with respect to the verdict denying forfeiture of the Boeing 707. On January 21, 1984 the Fifth Circuit affirmed the forfeiture of the seized weapons, but reversed as to the denial of forfeiture of the aircraft and rendered judgment for the government granting such forfeiture. The rationale for the Fifth Circuit's reversal as to the aircraft was based upon the Fifth Circuit's belief that FG had not done all that reasonably could be expected to prevent the prescribed use of its aircraft.[10]

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant Certiorari in the instant case in order to establish a standard to guide the Circuit Courts in their desire to police smuggling activities while still protecting the Constitutional rights of persons not involved in the criminal activity. The Constitution provides that no person shall be deprived of his property without due process of law.[11] The body of forfeiture law which has evolved over the past century

9. R. Vol. 1, P. 29-30. A copy of the memorandum of the Honorable George E. Cire is reprinted in Appendix "B".

10. The text of the judgment and opinion of the Fifth Circuit is reprinted in Appendix "C".

11. United States Constitution, Amendment V.

is in direct conflict with the due process clause of the Constitution. Although the Courts have uniformly held that the laws governing forfeiture of property used to facilitate a crime are not unconstitutional, the application of these laws in certain factual situations often transcend the boundaries of Constitutional decency. The cases in which this problem most frequently arises deal with forfeiture of the property of persons who owned the instrumentality but were otherwise unconnected with the prohibited act. The Courts have consistently reconciled the Constitution with forfeiture statutes by determining that the Government's action existed against the "res" or the object seized rather than the person whose property is taken. This fiction has sufficed as a handy tool for sidestepping the Constitution, but it ignores reality whereby people and not objects commit acts. The application of forfeiture statutes to the property of innocents further ignors commercial reality where in today's market place those in possession of property very often do not hold record title to that property.

A brief description of the evolution of forfeiture law is necessary for a complete understanding of the problems raised herein. The origin of forfeiture statutes is traceable to early common law. Originally, an object known as a deodand was forfeited to the Crown if a King's subject was accidentally killed by such object.[12] Gradually, the concept evolved whereby the deodand was confiscated to serve as a penalty for carelessness.[13] Al-

12. *Calero-Toledo v. Pearson Yacht Leasing Company*, 416 U.S. 663, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974). The value of the instrument was forfeited to the King, in the belief that the King would provide the money for the good of the dead man's soul.

13. *Id.*

though the law of deodand enabling the government to confiscate all property of convicted felons did not become a part of the common law of this country, forfeiture statutes were enacted shortly after the establishment of the Constitution. These statutes allowed the government to take property which was itself involved in a criminal enterprise. For at least a century and one-half the Courts had uniformly applied this early in rem doctrine whereby the offense is attached to the object rather than the offender.[14]

With this background and the uniform rejection of the innocense of an owner as a defense to civil forfeiture, the Supreme Court in the early seventies decided two cases which represent a variation in the stringently applied law of the in rem proceeding. These cases, *United States v. United States Coin and Currency,* 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971) and *Calero-Toledo v. Pearson Yacht Leasing Company,* 416 U.S. 683, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974) provided the first departure by the highest Court in the land from the anacronistic deodand body of law. While neither of these cases overruled the longstanding policy proclaiming innocense as no defense to forfeiture, both cases recognized the serious constitutional problems which arise in the taking of property of innocents. It is these two cases and the Circuit Courts' attempt to apply them which brings us to the current disastrous and confusing state of the law of forfeiture. The importance of the establishment of a definitive standard in dealing with

14. The *Palmyra,* 12 Wheat. 1, 6 L.Ed. 531 (1827); *Dobins Distillery v. United States,* 96 U.S. 395, 24 L.Ed. 637 (1878). These cases discuss at length the theory that innocence is no defense to a forfeiture proceeding as the action is instituted directly against the property or inanimate object which is involved in the enterprise.

matters of public interest is nowhere more evident than in the area of forfeiture law.

As will be demonstrated throughout this writing, the dicta in both the *Coin and Currency* case and the *Calero-Toledo* opinion raise serious questions regarding the constitutionality of depriving an innocent person of his property. The inconsistency arises, though, when one reads the outcome of these cases which basically revert to the original theory that innocence is no defense to seizure and forfeiture of property used in a criminal enterprise. As a result of this inherent conflict between the Supreme Court's holding and the language enunciated by the Court therein, the Circuit Courts have been allowed to run rampant in their application of the law with no apparent consistency in this application.

In *United States v. United States Coin and Currency,* the Supreme Court was faced with the question of whether the forfeiture of currency used in violation of gambling laws was proper in light of the owner's innocense of wrongdoing based upon his Fifth Amendment privilege against self-incrimination. As in the *Calero-Toledo* opinion the Court analyzed the ancient law of deodand and its affects on present day policy. The Supreme Court refused to specifically overrule the long line of decisions which determined that innocence was no defense to civil forfeiture, but stated that although the statute did not specifically state that the property shall be seized only if its owner significantly participated in the criminal enterprise, the Court could not readily infer that Congress intended a different meaning.[15] The Court was able to refrain from making a definitive statement

15. *United States v. United States Coin and Currency,* p. 1044.

on this issue by invoking the statute which allows a person to prove that forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to violate the law.[16] Finally, the result reached by the Court denied forfeiture based upon the claimant's invoking his Fifth Amendment privilege against self-incrimination and therefore based upon his innocence. Unfortunately, the methods used to achieve this result have not been recognized by the lower Courts. This case demonstrates the first step by the Supreme Court in reconciling the Fifth Amendment with forfeiture law. This, though, was only a step and the application of this case over the past fourteen years demonstrates that the Court must take its analysis a step further and define the true boundaries of forfeiture law in conjunction with the Constitution's grant of due process.

In *Calero-Toledo v. Pearson Yacht Leasing Company* the Supreme Court, by way of dicta, approached the innocence defense and its affect upon the conflict between forfeiture law and the due process clause. With this case the major conflict between the Circuits was born. The primary question in *Calero-Toledo* was whether pre-hearing seizure was constitutionally permissible.[17] The emphasis of this opinion was upon the constitutionality of seizure without prior notice rather than upon the more intricate question of the owner's innocence. Since in the *Calero-Toledo* case forfeiture was accomplished without a hearing, the Court was not required to fully

16. 19 U.S.C. Section 1618.

17. The Supreme Court noted probable jurisdiction in the *Calero-Toledo* case due to the District Court's ruling that the forfeiture statutes of Puerto Rico unconstitutionally deprived a claimant of property without just compensation.

address the guilt or innocence issue and its constitutional ramifications. The Court did, though, address this issue by way of dicta. After a lengthy discussion on the evolution of forfeiture dating back to the days of the deodand, the majority opinion delivered by Mr. Justice Brennan stated as follows:

> "This is not to say, however that the broad sweep of forfeiture statutes remarked in *Coin and Currency* could not, in other circumstances give rise to serious constitutional questions. Mr. Chief Justice Marshall intimated as much over a century and a half ago in observing that "a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed." *Peisch v. Ware,* 4 Cranch 347, 363, 2 L.Ed. 643 (1808). It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent."

The Court went on to state:

> "Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the prescribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive."

In the *Calero-Toledo*[1] opinion the innocence of the owner was never in question. The Court, though, found that no allegation had been made that the owner had done all that it reasonably could to prevent the unlawful use of its property. The qualifying language used

by the Court coupled with the failure of the Court to set forth the standards of care which must be taken make the present case ripe for consideration by this Honorable Court in order to clarify the intent of the Court and the standards which should be applied in the future.

As will be apparent after a review of the cases cited herein, the Circuit Courts have been allowed to run amok with their interpretation of *Calero-Toledo*. After a thorough reading of the numerous Circuit Court decisions rendered after *Calero-Toledo*, the reader will be able to draw but one conclusion. The only analysis which may be drawn from these decisions is that the Circuit Courts have been able to reach completely *opposite* results while all citing *Calero-Toledo*. In short, the Circuit Courts, while citing *Calero-Toledo*, have drawn the conclusion that innocence is *no* defense and also that innocence *is* a defense to forfeiture.

The Fifth Circuit has consistently cited *Calero-Toledo* for the proposition that innocence is *not* a defense in a civil forfeiture proceeding. *United States v. Ayo-Gonzales*, 536 F.2d 653, 662 (5th Cir. 1976).[18] In a recent case the Fifth Circuit flatly refused to apply the *Calero-Toledo* innocence standard for any purposes. *U.S. v. One 1978 Mercedes Benz, Four Door Sedan*, 711 F.2d 1297, 1303 (5th Cir. 1983). The Court, apparently relying upon pre-*Calero* decisions stated as follows:

> "Forfeiture defendants continue to cite this language [*Calero-Toledo* dicta regarding owner's innocence] in their defense but this Court has already made clear that the language in *Calero-Toledo* does not

18. The Fifth Circuit citing *Calero-Toledo* held that proof of culpability or fault was not necessary to sustain a vessel's forfeiture.

absolve drug transporters who claim innocence. In *United States v. One 1975 Ford F-100 Pickup Truck,* 558 F.2d 755 (5th Cir. 1977), this Court stated that in *Calero-Toledo* "The Court made clear that *Coin and Currency* did not overrule, sub silentio, prior cases upholding the application of forfeiture statutes." *U.S. v. One 1978 Mercedes Benz, Four Door Sedan,* at 1303.

The Fifth Circuit went on to say that they have consistently held that good faith or innocence is immaterial in the determination of the applicability of forfeiture statutes. As a result, the Court ordered forfeiture of the automobile without even conducting an inquiry into the *Calero-Toledo* double-pronged test. The Fifth Circuit apparently concluded that the Supreme Court language regarding nonculpability was meaningless.

In another case which was originally decided prior to *Calero-Toledo,* the Fifth Circuit refused to grant a petition for rehearing based upon the Supreme Court's language in *Calero-Toledo* which was decided one year later. *United States v. One 1969 Plymouth Fury Automobile,* 476 F.2d 960 (5th Cir. 1973), rehearing denied 509 F.2d 1324 (5th Cir. 1975). In this case Ford Motor Credit Company, a lienholder of a seized vehicle, was denied mitigation of the forfeiture which it sought to challenge based upon its innocence of wrongdoing. Six judges dissented in the Court's denial of the petition for rehearing and in their dissents cited the *Calero-Toledo* language whereby they determined that the constitutional claim of an innocent claimant should not be rejected. Id. at 1325. Thus, we can conclude that Judges within the same circuit have even reached varying conclusions regarding interpretation of *Calero-Toledo.*

In a 1980 case the Fifth Circuit refused to even address the *Calero-Toledo* two-pronged test once again. In this case the Court found that the only defenses available to a claimant of seized property would be to show that the violation was committed by a person who acquired possession illegally or that the vehicle was used as a common carrier. *United States v. One 1978 Chevrolet Impala,* 614 F.2d 983, 985 (5th Cir. 1980). In this instance the Court was applying only the statutory defenses without regard to the common law defenses enunciated in *Calero-Toledo.*[19] A review of the cases of just one Circuit demonstrates that there is no concise, lucid application of the Supreme Court standard by the lower Courts.[20] A review of the opinions of various other Circuit Courts will further illuminate this inconsistency.

The Ninth Circuit chooses its own interpretation of *Calero-Toledo.* In *United States v. 53 Eclectus Parrots,* 685 F.2d 1131, 1133 (9th Cir. 1982) the Court refused to even consider the issue of an owner's defense of nonculpability. The Court went on to say that nowhere in the statute controlling this case is there a definition of this nature and the innocence defense was *squarely rejected* in *Calero-Toledo.*[21] The Ninth Circuit in this opinion apparently did not consider the innocence defense set forth in *Calero-Toledo.* In reaching its decision concerning the language of the statute and the inability

19. The Court here looked only to the statutory exception provided in 49 U.S.C. Section 782.

20. *United States v. One 1975 Ford Pickup Truck,* 558 F.2d 755 (5th Cir. 1977). The Circuit said that the good faith or innocence of a claimant is immaterial in a seizure under the narcotics statutes.

21. The statute considered by the Court was 19 U.S.C. Section 1527.

of the claimant to raise a nonculpability defense, the Ninth Circuit cited *Calero-Toledo* and various other Circuit Court cases.[22]

Once a review of the cases holding innocence is no defense to forfeiture is accomplished, we must then turn to the line of cases which draw the opposite conclusion from the *Calero-Toledo* opinion and hold that innocence *is*, in fact, a defense to forfeiture. These cases which apply the *Calero-Toledo* theory proceed down their own divergent pathways with no apparent consistency in their decisions. Some cases even choose, like *Calero*, to hold that the property is subject to forfeiture while still giving some deference to the notion that innocence may be a defense. In *United States v. $6,700.00*, 615 F.2d 1 (1st Cir. 1980) the Court held that money which was embezzeled out of an estate and brought into the United States against the customs law was subject to forfeiture. The Court, though, went on by way of dicta to state that an innocent sub-class *may* be protected, but here the actions of the innocent party were inconsistent with the use of reasonable care. *Id.* The Court failed to elaborate upon the rationale for its holding of lack of reasonable care and failed to set forth the standard which led to this conclusion. In fact, there is no evidence that the Court conducted a fact finding expedition into this area at all, but rather the opinion suggests that this language was merely an effort to project the appearance of adherence to precedent.

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22. The Ninth Circuit cited *Calero-Toledo* at 688-90, *United States v. Six Thousand Seven Hundred Dollars*, 615 F.2d 1 (1st. Cir. 1980); *United States v. One 1975 Pontiac LeMans*, 621 F.2d 444, 447 (1st Cir. 1980); *United States v. One Ford Pickup*, 558 F.2d 755, 756-57 (5th Cir.), among others for the proposition that innocence is no defense to a forfeiture proceeding.

The Sixth Circuit has followed a similarly incoherent course of action. In its review of a District Court decision granting forfeiture of an aircraft this Circuit concluded that the defendant did not do all that was reasonably possible to prevent the prescribed use of his property. *United States v. One 1951 Douglas DC-6 Aircraft,* 667 F.2d 502, 503 (6th Cir. 1981). The Court based this decision upon the facts set forth in the lower Court opinion. A review of the lower Court opinion demonstrates that the Court had determined since the claimant's secured interest had never been perfected prior to the vesting of the government's interest in the aircraft, the claimant's interest must yield regardless of whether he satisfied the *Calero-Toledo* requirement. *United States v. One 1951 Douglas DC-6 Aircraft,* 525 F. Supp. 13, 16 (W.D. Tenn. 1979).

The Court went on to say that claimant was, nevertheless, careless and not diligent in protecting his security interest in the plane by failing to take effective and affirmative steps to see that a licensed pilot operated it, that it was not involved in illegal narcotics traffic and that it was properly registered with the United States authorities. As the Court can well see, this language does not define a standard of care but merely elaborates upon the reasonable care concept. In essence, the Sixth Circuit found that the safest way to resolve the dilemma was to uphold the forfeiture while still appearing to consider the innocence defense. It is easy to conclude that the vague status of the law has led Courts to avoid application of the two-pronged *Calero* test at all costs.

The Ninth and Tenth Circuits have chosen to take a more straightforward approach. Unfortunately, the standards used by these Courts were nowhere enunciated in the

Calero-Toledo opinion. In *United States v. One 1957 Rockwell Aerocommander*, 671 F.2d 414, 418 (10th Cir. 1982) the Court after determining that the owner of an aircraft was innocent of any wrongdoing chose to apply a negligence standard in determining if the airplane should be forfeited. The Court inquired as to whether the owner was negligent and determined that his "inattentiveness" to the aircraft for a period of some months was per se negligence requiring the plane to be forfeited.

The Ninth Circuit has also devised its own test for determining whether the property of an owner not involved in criminal action should be forfeited. The standard established by this Court somes closest to *Calero-Toledo* application. The Ninth Circuit first inquires as to the owner's knowledge regarding an illegal transaction. If ignorance of the illegality was determined, the Court would then inquire as to whether the ignorance was reasonable. *United States of America v. One 1972 Chevrolet Blazer*, 563 F.2d 1386, 1389 (9th Cir. 1977). This standard makes no inquiry into the acts or conduct of the owner in preventing the illegal use of his property, but merely inquires as to his mental state at the time of the illegal use and whether this mental state was unfounded in light of the facts surrounding each case.

From the cases cited herein, we can draw but on conclusion. There is no definitive standard for the application of forfeiture laws to the property of innocents. The only consistency which appears in this long line of cases regards the Appellate Court review of the District Court fact findings. In no case other than the Fifth Circuit opinion in the case at bar does the Appellate Court substitute its own judgment for that of the District Court. In *Sentilles v. Inter-Carribean Shipping Corporation*, 361

U.S. 107, 108, 80 S.Ct. 173, 175 (1959) the Supreme Court granted Certiorari where it was asserted that the Court of Appeals had applied an improper standard of review upon a judgment rendered on the jury's verdict. In that case the Court held that it was not the function of an Appellate Court to reweigh the evidence and set aside a verdict merely because the Court or jury could have drawn different conclusions.

In the present case, the Fifth Circuit has done exactly what the Supreme Court has held to be outside of its province. In this case, the District Court presided over a four day trial in which the Court had an opportunity to view each witness and consider that testimony with regard to appearance, mannerisms and other circumstances which do not appear in the cold record which is delivered to the Court of Appeals. As the Courts have recognized through the years that a trial court or jury is in a better position to weigh evidence than an appellate court, the appellate court's factual review has been severely limited by the Courts and Congress. The District Court herein issued an opinion that the owner of the aircraft had no knowledge and did all that *reasonably* could be expected to prevent the prescribed use of his aircraft. The Fifth Circuit determined, quite simply, that the owner could have done more. This is nothing more than a substitution by the Court of Appeals of its own judgment merely because it felt that a different result should occur. To allow such a decision to stand does nothing more than obviate the need for trial courts. If this were the case, every matter could be directly submitted to the Appellate Court in the form of written briefs and written testimony to allow the Appellate Court to form its own opinion. This is not the spirit of our judicial system.

CONCLUSION

The unsettled state of the law of forfeiture as it should be applied to property owners unconnected with an illegal act presents a question so compelling in its effect upon the Constitutional due process clause as to require immediate review and the establishment of a definitive standard. As a result, this lack of guidance has produced clear conflicts among the Circuit Courts and has led to the rendition of opposite opinions. It has finally resulted in the Appellate Court's substitution of its own judgment for that of the trial court. Based upon the foregoing analysis, Petitioner, Fg Fleuzeugleasing GmbH respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

ROSS, BANKS, MAY, CRON & CAVIN

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Fg Fleuzeugleasing GmbH

AFFIDAVIT OF SERVICE

STATE OF TEXAS §
§
COUNTY OF HARRIS §

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been served upon the Solicitor General, Department of Justice, Washington, D.C., 20530, by Certified Mail No._____, Return Receipt Requested, and upon Pete W. Weston, Law Offices of Jack R. Bailey, 6200 Savoy, Suite 260, Houston, Texas 77036, by Certified Mail No._____, Return Receipt Requested in accordance with Rule 28.5 (c) on this the 22nd day of April, 1985.

_____
MARY LOU ANDREWS

SUBSCRIBED and sworn to before me the undersigned authority on this the 22nd day of April, 1985.

_____
Notary Public in and for
Harris County, Texas

My Commission Expires:_____

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-2920

UNITED STATES OF AMERICA

v.

ONE BOEING 707 AIRCRAFT, ET AL

CLAIMANTS: Fg FLEUGZEUGLEASING
GESELLSCHAFT M SERVOTECH
INTERNATIONAL ESTABLISHMENT

(Filed July 7, 1983)

FINAL JUDGMENT

In accordance with the jury's verdict entered on April 21, 1983 and the Memorandum and Order entered on this date, the Court ORDERS:

that one thousand one hundred forty-six (1,146) M16 A1 automatic weapons, two hundred fifty-nine (259) pistols, and one hundred (100) M203 grenade launchers are forfeited to the United States of America;

that one Boeing 707 aircraft, model 707-396C, VIN 20043, Austrian Registration No. OE-IDA shall be returned to its owner Fg Fleugzeugleasing GmbH; and

that each party shall bear its own costs of Court.

This is a FINAL JUDGMENT.

SIGNED and ENTERED this 7th day of July 1983.

/s/ GEORGE E. CIRE
George E. Cire
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-2920

UNITED STATES OF AMERICA

ONE BOEING 707 AIRCRAFT, ET AL

CLAIMANTS: Fg FLEUGZEUGLEASING
GESELLSCHAFT M SERVOTECH
INTERNATIONAL ESTABLISHMENT

(Filed July 7, 1983)

MEMORANDUM AND ORDER

Before the Court is Claimant Fg Fleugzeugleasing GmbH's ("Fg") motion for finding and judgment. The Government filed this action seeking forfeiture of one Boeing 707 aircraft and weapons, and Fg entered a claim for the aircraft. In a forfeiture action, the Government has the initial burden to prove probable cause for the seizure. 19 U.S.C. § 1615. After a hearing, on probable cause, the Court entered a certificate of probable cause for seizure of the aircraft and the weapons. The burden was then placed on the Claimants to prove that they were entitled to the aircraft and the weapons. 19 U.S.C. § 1615; *Bush v. United States,* 389 F.2d 485, 487 (5th Cir. 1968); *Rubin v. United States,* 289 F.2d 195, 200 (5th Cir. 1961); *United States v. $11,580,* 454 F.Supp. 376, 381 (M.D. Fla. 1978).

The Court ruled that the aircraft was a common carrier; therefore, the statutory common carrier exception to a forfeiture action applied to Fg. 19 U.S.C. § 1594. For forfeiture to occur when a vessel has common carrier status, the Government has the burden to prove that the owner or master or other person in charge of the vessel was a consenting party or was privy to the alleged illegal act at the time it occurred. 19 U.S.C. § 1593; *EA Shipping Co. v. Bazemore,* 617 F.2d 136, 138 (5th Cir. 1980); *United States v. One Liberian Refrigerator Vessel,* 447 F.Supp. 1053, 1056 (M.D.Fla. 1977), *aff'd sub nom., EA Shipping Co. v. Bazemore,* 617 F.2d 136 (5th Cir. 1980). The jury concluded that Fg neither consented to nor participated in an illegal attempt to export arms from the United States. However, the jury found that the operator of the aircraft, Montana-Austria, did consent to or participate in an illegal attempt to export arms from the United States. The statutory common carrier exception protects vessels only if the person in charge of the vessel at the time of the alleged illegal act did not consent or participate in such act. Since the jury determined and the evidence showed that the operator of the vessel did consent to the illegal act, the statutory common carrier exception does not protect the aircraft from forfeiture.

Fg also asserts that the common law exception to forfeiture as stated by the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974), should protect the aircraft from forfeiture. In *Calero-Toledo,* the Supreme Court noted that forfeiture may be "unduly oppressive" in some circumstances, such as when an owner "proved not only that he was uninvolved in and unaware of the wrongful activity, but also that

he had done all that reasonably could be expected to prevent the proscribed use of his property." 416 U.S. at 689. *See United States v. One 1975 Ford F100 Pickup Truck*, 558 F.2d 755, 757 n.4 (5th Cir. 1977). The jury found that the aircraft's owner, Fg, was unaware and uninvolved in the illegal export of arms. Fg instructed Montana-Austria in the aircraft lease to not transport goods "whose transportation is prohibited by national or international provisions." Further, Fg's managing director testified that he instructed Montana-Austria regarding the use of the aircraft and that he had stationed an agent in Montana-Austria's office to supervise cargo shipments. Fg did all that it reasonably could be expected of an aircraft leasing company to prevent illegal use of its aircraft. Therefore, forfeiture of the aircraft would be "unduly oppressive" as the Supreme Court stated in *Calero-Toledo*. See *Calero-Toledo*, 416 U.S. at 689.

Accordingly, it is ORDERED that Claimant Fg Fleugzeugleasing GmbH's motion for finding and judgment is GRANTED.

SIGNED and ENTERED this 7th day of July 1983.

/s/ GEORGE E. CIRE
GEORGE C. CIRE
United States District Judge

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellee-Appellant,

v.

ONE BOEING 707 AIRCRAFT, etc., et al.,
Defendants-Appellees,

Servotech International Establishment,
Defendant-Appellant.

No. 83-2485.

United States Court of Appeals,
Fifth Circuit.

Jan. 21, 1985.

Arms broker appealed, and Government cross-appealed, from a judgment of the United States District Court for the Southern District of Texas, George E. Cire, J., granting forfeiture of weapons seized during illegal attempt to export arms to Republic of South Africa without a license, but denying forfeiture of airplane used in attempt. The Court of Appeals held that: (1) neither conduct of private citizen who informed Customs Service of contact by arms broker concerning purchase of weapons in the United States for export to Republic of South Africa, nor conduct of Government in engaging in undercover investigative activity with respect to such attempt, was so outrageous as to warrant finding that arms broker's due process rights were violated by seizure and forfeiture of weapons, but (2) once airplane lessor's suspicions that possible illegal activity was afoot in charter of his airplane were aroused, more effective steps were required

to protect airplane from illegal use and subsequent forfeiture than mere instruction of delegate to secure proper documentation.

Affirmed in part, reversed in part, and rendered.

Appeals from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, JOHNSON, and WILLIAMS, Circuit Judges.

PER CURIAM:

This is a civil forfeiture case in which the government, upon a showing of probable cause, seized weapons and one Boeing 707 airplane which were involved in an illegal attempt to export arms to South Africa without a license.[1] After a jury trial to determine whether the weapons and aircraft should be forfeited, the district court entered judgment granting forfeiture of the weapons to the government, but denying forfeiture of the Boeing 707, returning the airplane to its owner. The owners of the weapons appeal forfeiture while the United States cross appeals the denial of forfeiture as to the airplane. We affirm as to forfeiture of the weapons and reverse the denial of forfeiture as to the Boeing 707.

I

In early 1981, Gary Howard, an arms broker acting as agent for Balotta Trading Establishment, a Liechten-

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1. The United States filed this forfeiture action pursuant to 22 U.S.C. § 401 and 22 C.F.R. § 127.06 for attempted export without the legally required licenses and registrations in contravention of 22 U.S.C. § 2778, 18 U.S.C. § 371 and 22 C.F.R. articles 121, 122, 123, and 127.

stein corporation, was contacted by another arms broker, representing Servotech International Establishment ("Servotech"). Servotech, a Liechtenstein corporation, was engaged in buying and selling various commodities, including arms and weaponry. This phone call to Howard on behalf of Servotech was in regards to purchasing weapons in the United States for delivery to the Republic of South Africa. Concerned about the possible illegality of this proposed transaction, Howard contacted the Customs Service. As a result of Howard's phone call, Customs entered into an undercover operation, teaming one of its special agents, Dan Winkler, with Howard.

In mid-April 1981, Howard was contacted again by Servotech's representative and introduced to Peter Towers, who along with John Parks, were agents for Servotech. After numerous conversations between Towers or Parks and Howard, Servotech, through Howard, entered into an agreement with Balotta, whereby Balotta would purchase weapons for Servotech for export to South Africa.

On April 27, 1981, Towers met with Howard and undercover Customs Agent Winkler. Their conversation was tape recorded. At this meeting, Towers announced the shipping arrangements for the weapons had been finalized and that a phony end use certificate showing Sudan as the final destination for the weapons would disguise the true destination of South Africa.

Soon thereafter, Towers made two wire transfers totalling approximately $1.2 million to Balotta's account at the Republic National Bank in Dallas. Howard was to use this money to purchase the weapons ordered by Servotech. However, as part of the undercover operation, Howard transferred approximately $629,000 to Customs,

and Customs purchased the weapons[2] for Servotech. Howard used an additional $10,000-15,000 to buy pistols for Servotech. Ostensibly, the remainder of the $1.2 million remained in Balotta's account.[3]

On May 17, 1981, the weapons were delivered to Houston Intercontinental Airport by Customs agents posing as truck drivers. Towers and Parks were arrested while inspecting the weapons, but before any weapons were actually loaded on the waiting Boeing 707. Towers and Parks eventually pled guilty to wilfully attempting to export weapons without a license in violation of 22 U.S.C. § 2778 (a) and (b) and 22 C.F.R. 127.01.[4]

Servotech had chartered the waiting Boeing 707 from Montana-Austria, GmbH, an Austrian based charter service. At the time the aircraft was seized, Montana-Austria had contracted with Servotech to fly a shipment from Houston to South Africa. Montana-Austria did not own the 707, but rather, leased it from Fg Flugzeugleasing GmbH ("Fg").

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2. The weapons purchased by Customs and subsequently seized and forfeited include 1,146 M16A1 automatic rifles, 259 pistols, and 100 M203 grenade launchers.

3. Servotech alleges that the government seduced some $1.2 million from Servotech which has never been returned. Servotech's claim is not properly brought against the United States because the money was delivered to Balotta and has never been in the government's possession, except for that portion used by Customs and Gary Howard to purchase the weapons which are the subject of this appeal. Testimony in the record reveals that any money remaining is not subject to control by the United States. Consequently, if Servotech seeks return of what remains of the $1.2 million wired to Balotta, its recourse lies against others than the United States.

4. The guilty pleas of Towers and Parks do not bind Servotech in this action. As a separate corporate entity, Servotech is not estopped by the guilty pleas of its agents from seeking to protect its property from forfeiture. The criminal admissions of Towers and Parks in no way constitute a waiver of any defenses available to Servotech.

Fg is a West German corporation, wholly owned by Carl Press. During 1978, Fg leased the Boeing 707 to Montana-Austria. Under the lease agreement Montana-Austria was to use the 707 in routine charter flights of passengers and cargo to various parts of the world. The lease agreement contained a provision requiring Montana-Austria to abide by all national and international transport laws.[5] Fg was not involved in the daily operations of Montana-Austria, but periodically sent a representative to check on the charter service and assure proper adherence to all agreements.

On May 7, 1981, Montana-Austria sent a telegram to Civil Aeronautics Board requesting confirmation to fly a cargo of steel fabricates to Khartoum, Sudan on May 12. A destination change to Johannesburg, South Africa was requested on May 11.[6] Press was notified of this change in destination and immediately instructed his representative in Vienna to check the flight documents and export licenses to make sure they were in order. The 707 was seized in Houston on May 12.

The basis of this civil forfeiture action is 22 U.S.C. § 401 which prohibits the illegal exportation of war materials. Section 401 permits seizure of items used in connection with an attempt to export munitions illegally and

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5. The lease provision provided as follows:
The lessee agrees to only use the aircraft in compliance with any national and international air traffic rules and laws and not to transport goods or persons whose transportation is prohibited by national or international provisions.

6. Due to international time changes there is some uncertainty as to the exact timing of this interchange. Press was in New York when he received word of Montana-Austria's requested destination change and shortly thereafter flew to West Germany. It appears, however, that the request was made less than 48 hours before the seizure occurred.

permits forfeiture of all arms and vehicles seized pursuant to this statute.

[1] Civil forfeiture laws require the government make a showing of probable cause before it seizes an item used in violation of its laws. *See United States v. One 1978 Mercedes Benz, Four-Door Sedan,* 711 F.2d 1297 (5th Cir. 1983); *United States v. One 1975 Ford Pickup Truck,* 558 F.2d 755, 756 (5th Cir. 1977); *United States v. One 1973 Pontiac Grand Am,* 413 F.Supp. 163, 165 (W.D. Tex. 1976). A probable cause proceeding as to the arms and Boeing 707 was held on April 18, 1983. After a two-day hearing, the district court ruled the government had probable cause to seize the weapons and aircraft under the belief that Servotech's agents, Parks and Towers, were attempting to transport the weapons to South Africa in violation of Customs regulations.

After the court found probable cause, a jury was asked to determine the fact issues relating to forfeiture. Through special verdicts, the jury declared that (1) the weapons were the subject of an illegal export attempt; (2) Fg did not consent to or participate in the attempt; (3) Montana-Austria did consent to or participate in the illegal exportation attempt.[7]

Fg sought a judgment in its favor arguing that the government should be denied forfeiture of the aircraft based on the jury's finding that it did not consent to or participate in the illegal export attempt. Servotech filed a Motion for Judgment Notwithstanding the Verdict. The district court entered judgment granting Fg's motion to

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7. Montana-Austria is not a party to this suit; the company went into bankruptcy in Austria shortly after the seizure at issue in this case.

deny forfeiture of the aircraft. Servotech's motion was not granted and the weapons were forfeited to the government.

II

We deal first with Servotech's appeal of the decision to forfeit the weapons to the United States. Servotech presents two arguments as to why forfeiture of the weapons should be denied. First, Servotech argues the government's conduct in its undercover operation was so outrageous as to make forfeiture a denial of due process. Second, Servotech argues as a matter of law its agents never attempted to export and no regulations existed to make exporting munitions illegal. These arguments are without merit.

A

Servotech argues forfeiture is unwarranted in this case due to government misconduct in the use of over zealous law enforcement techniques. Essentially, Servotech claims its due process rights were violated by the seizure and forfeiture of property (munitions and money) involved in a crime the government had such a heavy hand in committing. As Servotech states, at issue is whether law enforcement conduct fell below societal standards so that the public would regard such conduct an abuse of government power. Thus framed, we find the conduct of the government and its citizen informer, Gary Howard, perfectly proper and well within the confines of acceptable behavior by law enforcement officers.

Servotech's due process argument borrows heavily from concepts developed in the law of criminal entrapment. Servotech's position is that regardless of whether its agents,

Towers and Parks, were predisposed to commit the crime the conduct of Customs agents was so outrageous as to violate notions of fundamental fairness. Servotech contends that such behavior could prevent a criminal conviction,[8] and therefore should deny civil forfeiture as well.

Servotech's argument is not an entrapment argument. Rather, it is the due process aspect of entrapment and entrapment-like fact situations which involve undercover operations. Such operations often find law enforcement officials intimately involved in the commission of a crme. This circuit recognized a due process defense within the context of entrapment in *United States v. Tobias,* 662 F.2d 381 (5th Cir. 1981).[9] However, *Tobias* indicated that a due process violation would be found in only "the rarest and most outrageous circumstances." *Id.* at 387. Outrageous conduct turns upon the totality of the circumstances. *Id.* Therefore, to determine whether due process has been violated in this civil forfeiture case, we look to the totality of the circumstances and balance government involvement against the extent of participation and pre-

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8. Servotech structures its argument from language in *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), where the Supreme Court acknowledged "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ." *Id.* at 431-32; 93 S.Ct. at 1643. This possibility was reiterated by a majority of Justices in the plurality opinion *Hampton v. United States,* 425 U.S. 484, 489, 96 S.Ct. 1646, 1649-50, 48 L.Ed.2d 113 (1976).

9. Other Fifth Circuit cases on the due process aspect of entrapment include *United States v. Garrett,* 716 F.2d 257, 275 (5th Cir. 1983); *United States v. Lane,* 693 F.2d 385, 388 (5th Cir. 1982); *United States v. Nicoll,* 664 F.2d 1308, 1314 (5th Cir. 1982); *United States v. Gray* 626 F.2d 494 (5th Cir. 1980); *United States v. McClure,* 577 F.2d 1021 (5th Cir. 1978).

disposition of Servotech's agents to commit the crime. *Id.*[10]

[2] Of prime importance in rejecting Servotech's due process argument is that Gary Howard, who supplied the tip to the Customs Service, was at all times a private citizen. He was neither a paid informant nor employed by the government. The evidence showed that Howard did not initiate contact with Servotech. Rather, he was approached by an arms broker representing Servotech in regards to obtaining arms for export to South Africa.[11] After this initial telephone call, Howard voluntarily notified the Customs Service of a potentially illegal transaction. There is no evidence that Howard was instructed by Customs to initiate further contact. Rather, Howard was merely to tape record any conversations which he might have with Servotech or its agents and representatives. Servotech's representative arms broker contacted Howard a second time, again by telephone. This second call introduced Howard to Servotech's agents, Towers and

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10. Although this method of analysis smacks of entrapment related legal theories, we do not mean to imply that entrapment is available as a defense to civil forfeiture. *See United States v. One 1972 Wood, 19 Foot Custom Boat,* 501 F.2d 1327, 1330 (5th Cir. 1974). Because Servotech relies on entrapment related due process theories to argue the government is barred from seizing its property, we must similarly look to an entrapment analysis as the benchmark for determining whether the government's behavior in this case violated due process. Our focus is the determination of outrageous conduct. We look to entrapment concepts solely as an analytical tool for making that determination.

11. The evidence adduced at trial established that Servotech received a purchase order from the Armaments Corporation of South Africa, Ltd. on October 30, 1980 for 1000 M16A1 rifles, 700 M203 grenade launchers, 250 M16A1 carriers and 20 commando rifles. This order was received four months before Howard was first contacted by Servotech's representative in late February or early March 1981.

Parks, and was the springboard from which negotiations began for the procurement of weapons which Servotech would attempt to export to South Africa. This evidence shows Servotech initiated contact and followed through without any evidence of prodding or inducement by the government or its informant.[12] Clearly, then, Towers and Parks were predisposed to commit this crime, which was avoided only through the voluntary participation of Gary Howard.

Moreover, the evidence shows Towers and Parks were more than just predisposed to commit the crime. The nature of Towers' and Parks' involvement in the scheme as "predisposed active participant[s]," *see Tobias,* 662 F.2d at 387, dramatically dilutes Servotech's claim of government misconduct. Towers and Parks planned the entire transaction and were fully committed to its execution. After receiving an arms order from the Armaments Corporation of South Africa, Ltd., Servotech initiated and completed negotiations with Howard for the arms purchases. Servotech's agents obtained a phony end use certificate for delivery to the Sudan, supplied the money and arranged air transport with Montana-Austria. Throughout this scheme, Servotech's role predominated. By procuring the arms, government agents played only a small, albeit instrumental, part in the process.

[3] In reviewing the government's role, we find nothing irregular or outrageous in the fact that Customs actually purchased the weapons after Servotech wired money to Howard, who in turn transferred a portion of

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12. *Cf. Williamson v. United States,* 311 F.2d 441, 445 (5th Cir. 1962) (Information supplied by an informer pursuant to a contingent fee arrangement whereby the informer was to provide evidence against named individuals for crimes not yet committed presented obvious "opportunities for abuse.").

the money to Customs. After being alerted to Towers' and Parks' predisposition to export arms illegally, the government was entitled to test their intent to attempt this crime by putting these weapons at their disposal and to institute forfeiture proceedings upon commission of the crime. The fact that government officers or employees merely afforded the opportunity or means for the commission of the offense will not defeat the resulting criminal penalties. *United States v. Russell,* 411 U.S. 423, 435; 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973); *United States v. Tobias,* 662 F.2d 381, 384 (5th Cir. 1981). We see no reason not to apply this tenet to civil forfeiture penalties as well.

[4] Nor do we find fault in what Servotech claims were "weeks of duplicity" during which government undercover agents worked with Towers and Parks to execute the illegal transport. Just as artifice and stratagem will not defeat criminal prosecution, the mere fact of deceit will not defeat forfeiture.[13]

Contrary to Servotech's assertions, we do not see how Towers and Parks were led down the "primrose path" against their will. The government may have followed Towers and Parks down that path, but Towers and Parks were clearly in the lead. There was no overreaching on the part of government agents, and the degree of government involvement when considering the totality of the

13. For examples of cases upholding the use of deception by government agents to expose criminal activity, see *United States v. Russell,* 411 U.S. 423, 435-36; 93 S.Ct. 1637, 1645, 36 L.Ed.2d 366 (1973); *Lewis v. United States,* 385 U.S. 206, 208-09, 87 S.Ct. 424, 425-27, 17 L.Ed.2d 312 (1966); *Sorrells v. United States,* 287 U.S. 435, 441-42, 53 S.Ct. 210, 212, 77 L.Ed. 413 (1932); *United States v. Lane,* 693 F.2d 385, 388 (5th Cir. 1982); *United States v. Tobias,* 662 F.2d 381, 386 (5th Cir. 1981).

circumstances was not outrageous.[14] We find no government misconduct and hence no due process violations. Because our holding is based on a finding of no government misconduct, we expressly pretermit as an issue whether government misconduct, if present, would affect forfeiture.

B

In its second argument, Servotech asserts that as a matter of law no illegal attempt to export arms was ever made by Servotech's agents, Towers and Parks. There are two aspects to this argument. Servotech argues that because the alleged export attempt was not "presently imminent," it technically was not an "attempt" under the law. Servotech also argues that at the time of arrest no arms export regulations were in force to make their attempt to export illegal.

We find the argument that Servotech's actions did not rise to the level of a bona fide attempt without merit. Unlike the cases Servotech relies on to support its claim that as a matter of law imminence was absent in this

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14. Our decision is in accord with the due process related entrapment cases of this circuit. *See, e.g., United States v. Lane,* 693 F.2d 385, 387 (5th Cir. 1982) (Contingent fee payments did not violate due process when informant voluntarily approached police with interest in becoming informant and government did not target individuals for informant's efforts); *United States v. Nicoll,* 664 F.2d 1308 (5th Cir. 1982) (Although DEA agents initiated contact, defendant actively negotiated deal for cocaine); *United States v. Tobias,* 662 F.2d 381 (5th Cir. 1981) (Government conduct was not outrageous where DEA set up chemical supply company to detect illicit drug manufacture and urged defendant to manufacture amphetamines after he cancelled his order for cocaine supplies); *United States v. Gray,* 626 F.2d 494 (5th Cir. 1980) (No due process violation; although government agents not only suggested the drug smuggling scheme, but also furnished defendants with repair services, an air strip and a crew).

case,[15] Towers and Parks had more than "mere intention." *See United States v. Moreno,* 182 F.2d 258, 259 (5th Cir. 1950). These weapons were not merely stored in a warehouse subject to a vague intention to unlawfully export them at a distant time in the future. *Cf. Moreno,* 182 F.2d at 259 (tires intended to be illegally exported to Mexico stored in claimant's home). Towers and Parks took specific and significant steps toward fulfilling their intent. Besides ordering the weapons and securing air transportation and phony documents, Towers and Parks arrived at the airport on the scheduled day of departure and were inspecting the weapons immediately prior to loading the airplane.

[5, 6] Thus, they acted beyond mere preparation, in such a way that all steps had been taken towards commission of the crime itself.[16] That the weapons were at the airport ready to be loaded on an airplane that would depart for South Africa within hours is sufficiently imminent to qualify as an illegal attempt, regardless of whether the weapons were actually loaded on the plane

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15. Much of Servotech's argument hinges on cases which focus on outmoded statutory language. *See e.g., United States v. Moreno,* 182 F.2d 258 (5th Cir. 1950); *Rimmer v. United States,* 172 F.2d 954 (5th Cir. 1949). These cases were decided prior to 1953 when the United States was entitled to forfeiture when "the property seized shall appear to have been *about to* be" unlawfully exported. 22 U.S.C. § 401 (emphasis added). However, 22 U.S.C. § 401 has been amended. The pertinent language now permits forfeiture whenever there is probable cause to believe that arms or munitions of war *"are intended to be or are being"* exported. (Emphasis added). The "about to" language upon which Servotech centers its argument for "present imminence" has been excised. Consequently, we find the authority Servotech cites unpersuasive.

16. Servotech does not complain of the court's charge to the jury on "attempt" which was as follows:

> By the term "attempt," the law means acting beyond mere preparation in such a way that all steps have been taken towards commission of the crime itself.

or whether the plane was set in motion toward actual departure. The fact that, unbeknownst to Towers and Parks, undercover government involvement made any actual export impossible does not alter the jury's finding sufficient intent and overt acts to warrant a conclusion of attempted export. When the facts show that neither the intention to export nor the plan by which it would be carried out have been abandoned, but rather, both are actually continuing, an attempt to export illegally has been made as a matter of law. *Zarranz v. United States,* 182 F.2d 650, 652 (5th Cir. 1950).

Servotech's second argument related to the crime of attempt contends that the federal regulations on which the government based forfeiture of the weapons do not apply to attempted export. Servotech claims these regulations apply only to imports and that at the time of the seizure no law had been promulgated to proscribe attempts to export weapons.

Servotech structures its argument on a series of presidential executive orders issued to implement enforcement of arms control statutes.[17] President Eisenhower originally

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17. Section 414 of the Mutual Security Act of 1954 provided the original authority for issuance of the executive orders relied on by Servotech. This section is now codified at 22 U.S.C. § 2278 and reads in pertinent part as follows:

> In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.

22 U.S.C. § 2778(a)(1).

delegated his authority under these statutes to the Secretary of State in Executive Order 10575. Executive Order 10973, signed by President Kennedy, created regulations to control international arms trafficking. These regulations, embodied in 22 C.F.R. articles 121-127 delineate the munitions list, registration and licensing requirements, and the violations, penalties, and administrative remedies for exports or attempted exports of listed munitions without a license. Servotech argues that Executive Order 11432, signed by President Johnson on October 22, 1968, abrogated these arms regulations as they pertained to export. Specifically, Servotech cites the following language from Executive Order 11432 to support its contention:

> Sec. 2. *All regulations issued and presently in effect* pursuant to Section 414 of the Mutual Security Act of 1954, as amended, *shall, insofar as they relate to control of the import of arms,* ammunition and implements of war, including technical data relating thereto, *continue in effect and be administered by the Secretary of the Treasury* until revoked or superseded by him. All pending applications for import licenses not acted upon by the Secretary of State at the date of this order shall be transferred to the Secretary of the Treasury for appropriate action. (Emphasis added).

Servotech claims this executive order abrogated all export and import regulations, but immediately renewed only *import* regulations as indicated by the emphasized language above. Servotech asserts that subsequent to Executive Order 11432 all export regulations vanished. Thus, Servotech reasons that at the time the weapons were seized the regulations embodied in 22 C.F.R. articles 121-127 were either promulgated without authority or

pertained only to the *import* of arms and did not proscribe the export activity in question.

[7] This interpretation is implausible. Executive Order 11432 abrogated neither import nor export laws. It merely transferred the administration of import regulations from the Secretary of State to the Secretary of the Treasury. Export regulations remained in effect, unaffected by Executive Order 11432 and therefore, fully operable to proscribe Servotech's attempt to export munitions to South Africa without a license.

III

The government cross appeals to contest the denial of forefeiture as to the Boeing 707. The jury found, based on a preponderance of the evidence, that (1) the owner Fg, had not consented to or participated in the illegal attempt to export the weapons; and (2) the operator of the aircraft, Montana-Austria, did consent to and participate in the illegal export attempt. In accord with this finding, the trial judge denied forfeiture and returned the aircraft to Fg.

The court ruled, as a matter of law, that the aircraft was a common carrier and, therefore, subject to the statutory common carrier exception to forfeiture under 19 U.S.C. § 1594. However, because the jury concluded that Montana-Austria, the operator of the aircraft, did consent to the illegal act, the statutory common carrier exception could not be invoked to protect the plane from forfeiture. We agree.

The district court based denial of forfeiture on the due process exception to forfeiture suggested by the United States Supreme Court in *Calero-Toledo v. Pearson Yacht*

Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed2d 452 (1974). In *Calero-Toledo,* the Supreme Court permitted forfeiture of a leased pleasure yacht after police found marijuana aboard. The Supreme Court upheld the seizure and forfeiture as constitutional despite lack of prior notice or hearing and despite the fact that the leasor was neither involved in nor aware of the unlawful use of the yacht. "Statutory forfeiture schemes are not rendered unconstitutional because of their application to the property interests of innocents." 416 U.S. at 680, 94 S.Ct. at 2090. Because the vessel is treated as the offender without regard to the owner's conduct, "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Id.* at 683, 684-86, 94 S.Ct. at 2092, 2093. The Supreme Court also noted, in dicta, that forfeiture may be "unduly oppressive" in circumstances where an owner "proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Id.*, at 689-90, 94 S.Ct. 2094-95. The Supreme Court suggested that should an innocent property owner meet this standard, forfeiture could raise a due process question. *Id.* However, the owner in *Calero-Toledo* did not meet this exception because no allegation or proof was offered that the company did all that it reasonably could to avoid having its property put to unlawful use. *Id.* at 690, 94 S.Ct. at 2095.

This two-pronged test was applied by the district court to deny forfeiture of the 707. The first prong of the test, "uninvolved in and unaware of the wrongful activity," was decided by the jury in answering its special verdict. The correctness of this determination is not at issue. The

second prong, requiring a property owner to do "all that reasonably could be expected to prevent the proscribed use of his property," was found by the district judge in response to Fg's Motion for Finding and Judgment. To reach its conclusion that "Fg did all that . . . reasonably could be expected of an aircraft leasing company to prevent illegal use of its aircraft," the district court made three underlying specific fact findings: (1) Fg had instructed Montana-Austria in the aircraft lease to not transport goods "whose transportation is prohibited by national or international provisions;"[18] (2) Fg had instructed Montana-Austria regarding the use of the aircraft; and (3) Fg had stationed an agent in Montana-Austria's office to supervise cargo shipments. From these findings the district court reached the factual conclusion that Fg had met the second prong of the test outlined by the Supreme Court in *Calero-Toledo.*

These underlying findings were based on the testimony of Fg's sole owner, Carl Press. The government does not dispute these findings, but rather, asserts that their cumulative effect fails to meet the standard laid out by the Supreme Court in the exception to the *Calero-Toledo* doctrine. We agree.

A party whose property has been seized has the burden of proof to show he has done all that reasonably could be expected to prevent the illegal use of his property. That burden cannot be defined in precise, universal terms. Its operative texture—reasonableness—depends on the facts of the particular situation to which it is applied. We can only observe that "reasonably" is woven into the stout fabric of "all that could be expected." The standard was

18. *See supra* note 5.

intended to be high. However, it cannot be so strict that it fails to consider commercial realities that face those who transact business in the international marketplace.

Each of the district court's specific findings is supported by the record and therefore not clearly erroneous. However, the record reveals that these actions were taken in the normal course of Fg's business as leasor to Montana-Austria, prior to the occurrence of the events which led to seizure of the airplane. These findings do not relate to the actions Press took upon being alerted to possible illegal conduct by Montana-Austria.

The evidence concerning Montana-Austria's activities during the bulk of the lease period disclosed no reason to suspect it was involved in illegal activity. Press' periodic checks of Montana-Austria's operations disclosed no more than that the charter service routinely transported passengers, and on rare occasion cargo, to various parts of the world. The normalcy of these operations changed, however, when Press was told by his delegate that Montana-Austria requested a stop off in Johannesburg on its way to the Sudan. Press testified that upon hearing this he was very upset, that he felt this change would be illegal without a flight plan and asked his delegate in Vienna to make certain there were proper documents and licenses for a flight from Houston to Johannesburg.[19]

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19. Press testified to the following at trial:
I had a phone call from Vienna, and my delegate in Vienna told me. And if I recall correctly, this was on a Friday or on a Saturday, meaning two days before the aircraft was seized in Houston, and he called me in regard to some other matters concerning my businesses, and at the end he mentioned just by chance, I think, said that Montana wanted to use the aircraft on a charter to Khartoum; said they had been asking if they could, while in flight to Khartoum, could change flight plans into Johannesburg, South Africa, and that really upset me. I said,

[8, 9] Once Press was put on notice that Montana-Austria was about to engage in activity with his property that he thought would be illegal, his duty to do "all that reasonably could be expected" to prevent forfeiture increased. Strict forfeiture laws serve to prevent negligent entrustment of property. "To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." *Calero-Toledo,* 416 U.S. at 467-68, 94 S.Ct. at 2094. Thus, when Press became aware that possible illegal activity was afoot, he should have known he could no longer rely on the course of action he had been taking prior to his awareness of any irregularity. Once his suspicions were aroused he had an affirmative duty to take more effective steps to protect his property from illegal use and subsequent forfeiture. Yet, the proof shows that he merely instructed his delegate to secure proper documentation.

Here, the plane was seized within forty-eight hours of Press' conversation with his delegate in Vienna. Acknowledging that time and distance could have deterred personal involvement, this court need not require of Press that he contact regulatory authorities to determine whether proper flight plans were filed or the required end

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"We don't do any of such things." If they know their destination, it's Johannesburg, since they have to fly a flight plan into Johannesburg and not take any detours, because I felt that this would be illegal. I further asked my delegate in Vienna to make sure that there would not be a charter signed or accepted without having proper documents, export licenses and whatever other official documents would be required to carry out that flight from Houston into Johannesburg.

use certificates had been obtained. But we must reverse if we insist on no more than what Press himself acknowledged was necessary—a check on the documents required to fly from Houston to Johannesburg. Even using this minimum gauge, Press has failed to meet the standard. We find the record devoid of any proof that Press' agent checked with Montana-Austria or reported back to Press or that Press ever checked with his agent or anyone else to determine that his instructions had been executed.[20] The finding of the district court that Press did all that reasonably could be expected of an aircraft leasing company to prevent this illegal use of its aircraft is not supported by the record and is clearly erroneous.

The judgments appealed from are affirmed as to the forfeiture of the weapons seized and reversed and rendered as to the denial of forfeiture of the Boeing 707 aircraft. Costs of the appeals are assessed equally against Servotech International Establishment and One Boeing 707 aircraft.

AFFIRMED IN PART and, IN PART, REVERSED and RENDERED.

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20. To the contrary, Press testified as follows:

> After I had that telephone call on Friday or Saturday, I flew back to Germany. I was at that time in New York, and Monday morning I had a call from an Austrian newspaper asking me if I would have any comment or if I would want to say anything about the seizure of a Montana operated aircraft of the type 707. And I was very upset and angry, and I told him I have no knowledge of this. . . .
>
> Next thing, I called our delegate in Vienna and asked him about it. And he was also not aware of this incident, and he said, "I also have to check. . . ."